

**RUDLOFF WOOD & BARROWS LLP**  
ATTORNEYS AT LAW  
2000 POWELL STREET, SUITE 900  
EMERYVILLE, CALIFORNIA 94608  
(510) 740-1500

G. EDWARD RUDLOFF, JR. (State Bar No. 56058)  
KEVIN A. NORRIS (State Bar No. 206022)

**RUDLOFF WOOD & BARROWS LLP**

2000 Powell Street, Suite 900

Emeryville, California 94608

Telephone: (510) 740-1500

Facsimile: (510) 740-1501

E-Mail: [erudloff@rwblaw.com](mailto:erudloff@rwblaw.com)  
[knorris@rwblaw.com](mailto:knorris@rwblaw.com)

DAVID NEWMANN (admitted *pro hac vice*)

JOSEPH A. BAILEY III (admitted *pro hac vice*)

**HOGAN & HARTSON LLP**

555 Thirteenth Street NW

Washington DC 20004

Telephone: (202) 637-5600

Facsimile: (202) 637-5910

E-Mail: [dnewmann@hhlaw.com](mailto:dnewmann@hhlaw.com)  
[jabailey@hhlaw.com](mailto:jabailey@hhlaw.com)

Attorneys for Defendant  
FEDERAL INSURANCE COMPANY

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

CROWLEY MARITIME  
CORPORATION,

Plaintiff,

vs.

FEDERAL INSURANCE COMPANY;  
TWIN CITY FIRE INSURANCE  
COMPANY; and RLI INSURANCE  
COMPANY,

Defendants.

Case No. CV 08 0830 SI

**DEFENDANT FEDERAL INSURANCE  
COMPANY’S REPLY TO PLAINTIFF’S  
OPPOSITION TO MOTION TO  
DISQUALIFY**

Complaint Filed: 01/07/08

Hearing Date: 08/22/08

Accompanying Document:  
Declaration of Henry Nicholls

Defendant Federal Insurance Company (“Federal”) submits this reply to Plaintiff Crowley Maritime Corporation’s (“CMC”) Opposition to the Motion to Disqualify (the “Opposition”).<sup>1</sup> Notably, the Opposition never states that CMC will *not* call Richard Shively or Philip Pillsbury as a

<sup>1</sup> Federal understands that Defendant Twin City Fire Insurance Company is filing a comprehensive reply to the Opposition. Accordingly, Federal will limit its reply to certain assertions made by CMC regarding Federal’s communications with Richard Shively and other CMC counsel.

1 witness at trial. In fact, Mr. Shively and Mr. Pillsbury both tell the Court that “any such  
 2 determination would be *premature* at this point,” Shively Decl. ¶ 10; Pillsbury Decl. ¶ 4 — clearly  
 3 implying that CMC may call *both* attorneys at witnesses. Indeed, the Opposition acknowledges  
 4 that, at a minimum, Mr. Shively *will* be a “*necessary witness*” if CMC’s failure to obtain consent to  
 5 settlement remains a disputed issue at the time of trial. Opp. at 2-3.

6 Rather than disavowing any intention to rely on Mr. Shively’s or Mr. Pillsbury’s testimony,  
 7 CMC contends that these individuals can continue serving as counsel if the Court rules at the very  
 8 outset of this litigation that CMC’s failure to obtain its insurers’ consent to settlement “is not an  
 9 issue in this case.” Opp. at 17. To advance this theory, CMC argues that the Court should consider  
 10 and resolve in CMC’s favor a whole host of disputed factual and legal issues — all before any  
 11 dispositive motions have been filed, before any depositions have been conducted, and before CMC  
 12 has produced a single document in response to defendants’ discovery requests. Yet this Court  
 13 obviously cannot be called upon to consider or resolve such issues in the current posture of this  
 14 case. Indeed, the fact that CMC’s Opposition depends on the immediate resolution of these key  
 15 substantive issues demonstrates that the Motion to Disqualify is well founded.

16 In any event, as discussed below, the various factual assertions regarding Federal on which  
 17 CMC bases its Opposition, including CMC’s assertions regarding Mr. Shively’s April 5, 2007  
 18 conversation with Federal claims examiner Henry Nicholls, are plainly in dispute.

19 **I. CMC’S ASSERTION THAT NICHOLLS CONSENTED TO THE SETTLEMENT IS**  
 20 **FALSE**

21 CMC contends that its allegations regarding Mr. Shively’s April 5, 2007 conversation with  
 22 Mr. Nicholls are not contested because Federal has not submitted a declaration by Mr. Nicholls.  
 23 But CMC forgets that this particular factual dispute is established on the face of the pleadings in this  
 24 case. CMC itself chose to include in its Complaint three separate allegations regarding Mr.  
 25 Shively’s and Mr. Nicholls’ conversation. Am. Compl. ¶¶ 8, 12, 13. Federal’s Answer to the  
 26 Complaint denies each of those allegations. Federal Answer ¶¶ 8, 12, 13. In fact, CMC concedes  
 27 that “the Insurers dispute Mr. Shively’s characterization of his conversation with Mr. Nicholls.”  
 28

1 Opp. at 6. No declaration from Mr. Nicholls is required to establish that Mr. Shively's testimony on  
 2 this topic would involve a "contested matter."<sup>2</sup>

3 To eliminate any question that Mr. Shively's testimony is contested, Federal is submitting  
 4 Mr. Nicholls' declaration herewith. The declaration confirms that Mr. Nicholls disputes CMC's  
 5 and Mr. Shively's characterization of their conversation. Nicholls Decl. ¶¶ 3-7. In particular,  
 6 Mr. Nicholls never consented to the settlement and never gave any assurance that Federal would  
 7 consent to the settlement. *Id.* ¶¶ 4-5, 7. Far from consenting to the settlement, Mr. Nicholls  
 8 specifically told Mr. Shively that he understood CMC was not seeking coverage for the tender offer  
 9 portion of the settlement, and Mr. Shively did not suggest otherwise. *Id.* ¶ 4. CMC would not have  
 10 had any basis for seeking coverage for the tender offer, because the resulting costs would not  
 11 constitute Loss as defined by the Policy, and Mr. Shively did not contend otherwise. *Id.* Mr.  
 12 Nicholls may have indicated in this context that he assumed that Federal would not object to this  
 13 aspect of the settlement, but that is only because he understood from Mr. Shively's comments that  
 14 CMC was not seeking coverage for any portion of the tender offer. *Id.*

15 Mr. Nicholls also did not consent to the portion of the settlement pertaining to any fee award  
 16 to the plaintiff's counsel. *Id.* ¶ 5. Instead, he said Federal would need additional information,  
 17 including the briefing on plaintiff's fee application, before he could evaluate Federal's position  
 18 regarding this aspect of the settlement and any resulting fee award. *Id.* ¶ 5.

19 Federal agrees with CMC on one point: Mr. Shively's inaccurate statements regarding his  
 20 conversation with Mr. Nicholls should never be submitted into evidence. That is because Mr.  
 21 Shively's statements have no bearing on the plain consent provisions of the Federal Policy. Those  
 22 provisions specifically state that Federal "shall not be liable for any element of Loss incurred [or] or  
 23 for any obligation assumed . . . without [Federal's] prior written consent." Ficon Decl., Ex. G at  
 24 Executive Liability and Entity Securities Liability Coverage Section ("EL Section") ¶ 16(b)

25  
 26 <sup>2</sup> Contrary to CMC's position, CMC has the burden of establishing that this or any other  
 27 exception to Rule of Professional Conduct 5-210 applies. See *Benas v. Baca*, No. CV 00-  
 28 11507 LGB, 2003 WL 21530209, \*3 (C.D. Cal. July 1, 2003), clarified, 2003 WL  
 21692037 (C.D. Cal. July 10, 2003).

(emphasis added). Even Mr. Shively does not claim that Mr. Nicholls ever gave “prior written consent” to the settlement. Further, Mr. Shively concedes that Mr. Nicholls’ alleged statements about the possibility of future consent were subject to Federal’s review of additional information, including the briefing on the fee application. Shively Decl. ¶ 5.

Since even Mr. Shively’s testimony does not suggest that the consent requirements of the Policy were satisfied, it is unclear why CMC believes the conversation between Mr. Shively and Mr. Nicholls is relevant. CMC offers no explanation for this in its Opposition. Nonetheless, CMC’s Opposition makes clear that it intends to rely on Mr. Shively’s testimony, and possibly Mr. Pillsbury’s, if the consent issue goes to trial. Under these circumstances, disqualification from service as trial counsel is plainly appropriate. *See, e.g., Benas*, 2003 WL 21530209, \*3.

## **II. CMC’S ASSERTION THAT FEDERAL HAD NO RIGHT TO ENFORCE THE POLICY’S CONSENT REQUIREMENTS IS BASELESS**

CMC also argues that Federal lost its right to enforce the Policy’s consent requirements because Federal reserved its rights and did not handle the defense of the Franklin Fund Action. Opp. at 17-18. That argument must be rejected for four independent reasons.

First, CMC’s argument is predicated on cases involving insurance policies that gave an insurer the duty to defend the underlying action. *See, e.g.,* Opp. at 17 (citing *Pruyn v. Agricultural Ins. Co.*, 36 Cal. App. 4th 500, 516 (2d Dist. 1995)). Here, by contrast, the Federal Policy squarely placed the duty to defend on CMC, not Federal, but nevertheless unambiguously required Federal’s prior written consent to settlement. *See* Ficon Decl., Ex. G at EL Section ¶¶ 16(a)-(b). The mere fact that Federal did not have a duty to defend obviously does not preclude Federal from enforcing the express consent requirements of the Policy. *See Gribaldo, Jacobs, Jones & Assoc. v. Agrippini Versicherungen A.G.*, 3 Cal. 3d 434, 449 (1970) (consent to settle provision enforceable even though insurer did not have duty to defend); *Am. Int’l Specialty Lines Ins. Co. v. Cont’l Cas. Ins. Co.*, 142 Cal. App. 4th 1342, 1368 (2d Dist. 2006) (same, noting that duty to defend precedent did not prove the contrary). Rather, the consent provision must be applied as written. *See, e.g., Qualcomm, Inc. v. Certain Underwriters at Lloyd’s, London*, 161 Cal. App. 4th 184, 204 (4th Dist.

2008) (“If contractual language in an insurance contract is clear and unambiguous, it governs, and we do not rewrite it for any purpose” (internal quotation marks omitted)); *Jamestown Builders, Inc. v. Gen. Star Indem. Co.*, 77 Cal. App. 4th 341, 346 (4th Dist. 1999) (consent to settle provisions are fully enforceable “in the absence of economic necessity, insurer breach, or other extraordinary circumstances”); *Low v. Golden Eagle Ins. Co.*, 110 Cal. App. 4th 1532, 1544 (1st Dist. 2003) (same).

Second, CMC attempts to support its position by citing *Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 135 Cal. App. 4th 958 (2d. Dist. 2006), but the holding in that case addresses *excess* carriers who were invited to participate in settlement negotiations and declined to do so. The holding in *Fuller-Austin* obviously does not apply to Federal, a primary carrier, and has no bearing in any event where, as here, the carriers were given no opportunity to participate in settlement negotiations. *See* ALLAN D. WINDT, INS. CLAIMS & DISPUTES (“WINDT”) § 3:9 n.5 (2008) (noting the limited application of the *Fuller-Austin* holding). Indeed, this is clear from the same treatise sentence that CMC’s brief tellingly quotes only in part, and from the footnote accompanying that sentence. *Id.*; *Opp.* at 17.

Third, contrary to CMC’s argument, the very authority on which CMC relies makes clear that an insurer does not lose its right to consent merely by proceeding under a reservation of rights. *Fuller-Austin*, 135 Cal. App. 4th at 984.

Fourth, there is no basis whatsoever for CMC’s contention that Federal did not comply with its duty to pay Defense Costs. Federal’s initial reservation letter indicated that Federal would reimburse Defense Costs under a reservation of rights, subject to satisfaction of the \$500,000 retention. Ficon Decl., Ex. B at 6-7. Federal of course had no duty to pay Defense Costs prior to satisfaction of the retention. Ficon Decl., Ex. G at EL Section Decl. Item 4 and ¶¶ 2, 13(d); Shively Decl., Ex. E at Nov. 17, 2006 Letter (acknowledging applicability of retention). CMC first submitted defense invoices on April 23, 2007 — one month after CMC executed the settlement stipulation. *See* Shively Decl., Ex. E at Apr. 23, 2007 Letter; Nicholls Decl. ¶ 8. Federal audited the invoices to determine what portion of the invoices were properly chargeable as Defense Costs

1 and reimbursed CMC for the entire amount of Defense Costs that exceeded the \$500,000  
 2 deductible. The fact that Federal did not pay defense costs prior to the settlement is purely a  
 3 function of the deductible and CMC's own delay in submitting defense invoices, and therefore has  
 4 no bearing on Federal's right to enforce the Policy's consent provisions. *See Jamestown Builders*,  
 5 77 Cal. App. 4th at 346 (consent to settle provisions are fully enforceable "in the absence of  
 6 economic necessity, insurer breach, or other extraordinary circumstances"); *Low*, 110 Cal. App. 4th  
 7 1532 (breach of consent to settle provision barred coverage, where insured entered into settlement  
 8 agreement after insurer had agreed to defend under reservation of rights, but before insurer started  
 9 to defend the insured).

10 Moreover, contrary to the suggestion in CMC's counsel's declarations, Federal was actively  
 11 involved in monitoring the defense of the *Franklin Fund Action*. Nicholls Decl. ¶ 9. Indeed,  
 12 Federal only learned about the settlement of the action after Mr. Nicholls made one of multiple  
 13 periodic inquiries regarding the status of the case. *Id.* CMC's contention that Federal's handling of  
 14 this matter somehow deprived it of the right to consent to any settlement is utterly without merit.

15 For the reasons stated above and in Federal's Joinder, Federal would be greatly prejudiced if  
 16 Messrs. Shively and Pillsbury were permitted to serve as both witnesses and advocates at trial.  
 17 Federal accordingly respectfully requests that the Motion to Disqualify be granted.

18 Date: August 8, 2008

Respectfully submitted,

**RUDLOFF WOOD & BARROWS LLP**

By: /s./ Kevin A. Norris

G. Edward Rudloff, Jr.

Kevin A. Norris

Of counsel:

David Newmann (admitted *pro hac vice*)

Joseph A. Bailey III (admitted *pro hac vice*)

HOGAN & HARTSON L.L.P.

Attorneys for Defendant

FEDERAL INSURANCE COMPANY

**RUDLOFF WOOD & BARROWS LLP**  
ATTORNEYS AT LAW  
2000 POWELL STREET, SUITE 900  
EMERYVILLE, CALIFORNIA 94608  
(510) 740-1500

1 G. EDWARD RUDLOFF, JR. (State Bar No. 56058)  
2 KEVIN A. NORRIS (State Bar No. 206022)  
3 **RUDLOFF WOOD & BARROWS LLP**  
4 2000 Powell Street, Suite 900  
5 Emeryville, California 94608  
6 Telephone: (510) 740-1500  
7 Facsimile: (510) 740-1501  
8 E-Mail: [erudloff@rwblaw.com](mailto:erudloff@rwblaw.com)  
9 [knorris@rwblaw.com](mailto:knorris@rwblaw.com)

10 DAVID NEWMANN (admitted *pro hac vice*)  
11 JOSEPH A. BAILEY III (admitted *pro hac vice*)  
12 **HOGAN & HARTSON LLP**  
13 555 Thirteenth Street NW  
14 Washington DC 20004  
15 Telephone: (202) 637-5600  
16 Facsimile: (202) 637-5910  
17 E-Mail: [dnewmann@hhlaw.com](mailto:dnewmann@hhlaw.com)  
18 [jabailey@hhlaw.com](mailto:jabailey@hhlaw.com)

19 Attorneys for Defendant  
20 FEDERAL INSURANCE COMPANY

21 **UNITED STATES DISTRICT COURT**

22 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

23 CROWLEY MARITIME CORPORATION,

24 Plaintiff,

25 vs.

26 FEDERAL INSURANCE COMPANY;  
27 TWIN CITY FIRE INSURANCE  
28 COMPANY; and RLI INSURANCE  
COMPANY;

Defendants.

Case No. CV 08 0830 SI

**DECLARATION OF HENRY  
NICHOLLS IN SUPPORT OF  
FEDERAL INSURANCE  
COMPANY'S REPLY TO  
PLAINTIFF'S OPPOSITION TO  
MOTION TO DISQUALIFY**

I, HENRY NICHOLLS, declare as follows:

1. I am of counsel at the law firm Cohon & Pollak, LLP, and previously served as a Senior D&O Examiner for Chubb & Son, a division of Federal Insurance Company ("Federal"), the claims manager for Federal. I am over the age of 18 and am competent to testify to the matters set forth herein. I submit this declaration in support of Twin City's Motion to Disqualify Richard Shively and Philip Pillsbury of Pillsbury & Levinson LLP as Trial Counsel for Plaintiff, to which



**RUDLOFF WOOD & BARROWS LLP**  
 ATTORNEYS AT LAW  
 2000 POWELL STREET, SUITE 900  
 EMERYVILLE, CALIFORNIA 94608  
 (510) 740-1500

1 Federal has filed a Joinder.

2 2. While at Federal, I handled Crowley Maritime Corp.'s ("CMC") claim for insurance  
 3 coverage in connection with the action captioned *Franklin Balance Sheet Investment Fund, et al. v.*  
 4 *Crowley, et al.*, No. 888-VCP (Del. Ch.) (the "Franklin Fund Action"). As a result, I am familiar  
 5 with the matters set forth herein based on personal knowledge.

6 3. I have reviewed Crowley's Opposition to Motion by Twin City and Federal to  
 7 Disqualify Crowley's Counsel of Record and the Declaration of Richard D. Shively in Opposition  
 8 to Motion by Twin City and Federal to Disqualify Crowley's Counsel of Record. The statements  
 9 therein regarding my April 5, 2007 conversation with Richard Shively mischaracterize that  
 10 conversation and are incomplete and misleading in important respects.

11 4. On April 5, 2007, I spoke by telephone with Richard Shively. During that  
 12 conversation, I stated that I understood that CMC was not seeking insurance coverage for any  
 13 portion of the component of the Franklin Fund Action settlement involving Crowley Newco Corp.'s  
 14 ("Newco") tender offer for the Franklin Fund plaintiffs' stock holdings in CMC. That aspect of the  
 15 settlement clearly would not have been covered (even if CMC had timely sought Federal's consent)  
 16 because the costs of the tender offer would not represent Loss under the Policy. Mr. Shively  
 17 indicated that my understanding was correct, and said nothing to suggest that CMC was seeking  
 18 insurance coverage for any portion of the tender offer. Relying on this exchange, I stated that  
 19 because CMC was not seeking insurance coverage for any portion of the tender offer, I did not  
 20 expect that Federal would object to the tender offer portion of the settlement. I relied on my  
 21 understanding that CMC was not seeking coverage for the tender offer in my handling of the  
 22 settlement. At no point during my tenure with Federal did Mr. Shively or anyone else acting on  
 23 CMC's behalf tell me that CMC was seeking insurance coverage for any portion of the tender offer.

24 5. Later during the April 5, 2007 conversation with Mr. Shively, I stated that Federal  
 25 needed to review additional information before taking any position as to the portion of the  
 26 settlement pertaining to an award of CMC plaintiffs' attorneys' fees. Specifically, I requested the  
 27 briefing on the Franklin Fund plaintiffs' application for an award of attorneys' fees. I also  
 28



**RUDLOFF WOOD & BARROWS LLP**  
 ATTORNEYS AT LAW  
 2000 POWELL STREET, SUITE 900  
 EMERYVILLE, CALIFORNIA 94608  
 (510) 740-1500

1 requested that CMC forward copies of its defense counsel's invoices, so I could determine whether  
 2 any **Defense Costs** were due excess of the \$500,000 Deductible. Mr. Shively agreed to forward this  
 3 information, and gave no indication that there would be any problem with my reviewing this  
 4 information before taking a position as to coverage. I did not state during the April 5, 2007  
 5 conversation or at any other time that Federal consented to the plaintiffs' attorneys' fees component  
 6 of CMC's settlement.

7 6. Mr. Shively did not state during our conversation that CMC needed a response by  
 8 any particular time, and never suggested that the settlement would be withdrawn or modified in any  
 9 way if Federal declined to consent. On the contrary, it was clear from our discussion that the  
 10 settlement agreement already had been reached and was memorialized in a legally binding  
 11 document, and that nothing Federal did or said would affect the terms or conditions of the  
 12 settlement.

13 7. I never told Mr. Shively that Federal "would consent" or that Federal "would have  
 14 no problem consenting" to the overall settlement. CMC's and Mr. Shively's assertions in this  
 15 regard do not accurately characterize the conversation and leave out the crucial aspects of the  
 16 conversation described above.

17 8. On April 24, 2007, I received a letter from Richard Shively dated April 23, 2007,  
 18 forwarding copies of CMC's defense invoices. Ex. E to Shively Decl. at Apr. 23, 2007 Letter. At  
 19 no point prior to that date did CMC submit any defense invoices for reimbursement. The letter  
 20 stated that it was being sent in support of CMC's request for Federal's consent, but again did not  
 21 indicate that CMC needed an answer from Federal by any specific date. Ex. E to Shively Decl. at  
 22 Apr. 23, 2007 Letter.

23 9. I received no information regarding settlement until March 22, 2007. On that date, I  
 24 sent an e-mail to CMC's defense counsel in the Franklin Fund Action, Mr. Abramczyk, asking for  
 25 an update regarding the status of the pending motion to dismiss. In response, Mr. Abramczyk  
 26 informed me that CMC had "settled by offering a buy out." This came as a complete surprise to  
 27 me, because I had not received prior notice of any settlement negotiations, much less than a request  
 28

**RUDLOFF WOOD & BARROWS LLP**  
 ATTORNEYS AT LAW  
 2000 POWELL STREET, SUITE 900  
 EMERYVILLE, CALIFORNIA 94608  
 (510) 740-1500

1 for consent to settle, even after having requested and received updates on multiple prior occasions.  
 2 Throughout my time on the file, I actively monitored developments in the case. My initial  
 3 reservation letter raised questions concerning the selection of defense counsel and requested that  
 4 Federal be "kept advised of events contemporaneously with their occurrence." Ex. B to Ficon Decl.  
 5 at 7. On regular intervals thereafter, I requested, received and reviewed updates from CMC  
 6 regarding developments in the Franklin Fund Action, as well as multiple filings from that Action. I  
 7 attended the hearing in Wilmington, Delaware on the defendants' motion to dismiss. Among the  
 8 subsequent updates that I reviewed was a November 17, 2006 update from Steven Ficon, the end of  
 9 which stated that CMC would advise Federal of any further developments. Ex. E to Shively Decl.  
 10 at Nov. 17, 2006 Letter. Despite Mr. Ficon's promise, I never received notice of the settlement  
 11 negotiations that I now understand CMC has admitted were taking place between December 2006  
 12 and March 19, 2007.

13 I declare under the penalty of perjury and the laws of the United States that the foregoing is  
 14 true and correct and that this declaration was executed on this 8th day of August 2008, in  
 15 Hackettstown, New Jersey.

  
 HENRY P. NICHOLLS, ESQ.